Supreme Court, U.S.
FILED
FEB 1 1994
OFFICE OF THE CLERK

Case No. 93-713

IN THE

Supreme Court of the United States

GARY G. GRAHAM,

Petitioner,

v.

THE SUPREME COURT OF FLORIDA and THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Counsel of Record

CHARLIE MCCOY
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol – PL-01
Tallahassee, FL 32399-1050
(904) 488-9935

Attorneys for Respondents

QUESTIONS PRESENTED FOR REVIEW

ISSUE ONE

WHETHER THE RESPONDENTS VIOLATED THE DUE PROCESS AND EQUAL PROTECTION REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS BY SELECTIVELY ENFORCING THE CODE OF JURIDICAL CONDUCT AGAINST PETITIONER FOR IMPERMISSIBLE REASONS.

ISSUE TWO

WHETHER THE RESPONDENTS VIOLATED THE FREEDOM OF SPEECH GUARANTEE OF THE FIRST AMENDMENT BY REMOVING THE PETITIONER FROM HIS OFFICE AS AN ELECTED JUDGE IN THE STATE OF FLORIDA FOR HAVING PUBLICLY CRITICIZED ATTORNEYS.

ISSUE THREE

WHETHER THE FLORIDA CODE OF JUDICIAL CONDUCT AS APPLIED VIOLATES THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT DUE TO VAGUENESS OF CONSTRUCTION.

ISSUE FOUR

WHETHER THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION VIOLATED THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS BY

ACTING AS THE INVESTIGATOR, PROSECUTOR, JUDGE AND JURY.

ISSUE FIVE

WHETHER THE CONDUCT OF THE PROCEEDINGS IN THEIR TOTALITY RESULTED IN A FUNDAMENTALLY UNFAIR PROCEDURE THEREBY VIOLATING THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

1. The Decision of the Florida Supreme Court 1

2. The Findings of the Judicial Qualifications Commission 3

SUMMARY OF ARGUMENT 8

ARGUMENT 10

A GRANT OF CERTIORARI IS NOT WARRANTED IN THIS CASE BECAUSE THE DECISION OF THE FLORIDA SUPREME COURT ADOPTING THE FINDINGS OF THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION CLEARLY JUSTIFIES PETITIONER'S REMOVAL FROM OFFICE; PETITIONER'S ARGUMENT DOES NOT DEMONSTRATE CONFLICT WITH ANY OTHER APPELLATE DECISION NOR DOES IT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND SO FAILS TO ESTABLISH ANY BASIS FOR CERTIORARI REVIEW UNDER RULE 10.1(b) OR (c), RULES OF THE SUPREME COURT.

A. The Petition Fails To Establish That The Proceeding Below Was A Constitutionally Impermissible Instance Of Selective Enforcement Of The Judicial Code. (Petitioner's Issue I) 11

B. Petitioner Was Not Removed From The Bench For Exercising His First Amendment Right to Criticize Attorneys. (Petitioner's Issue II) 13

C. Petitioner Fails to Demonstrate That The Florida Code of Judicial Conduct Is Unconstitutionally Vague Or That The Point was Properly Preserved for Review (Petitioner's Issue III) 18

D. The Structure of Florida's Judicial Disciplinary Mechanism Does Not Violate Due Process (Petitioner's Issue IV) 22

E. The Proceeding Against Graham Was Not Fundamentally Unfair. (Petitioner's Issue V) . . . 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases ***Page(s)***

Broaderick v. Oklahoma, 413 U.S. 601, 615-616 (1973) 20

Connick v. Myers, 461 U.S. 138 (1983) 16

Gentile v. State Bar of Nevada, 111 S.Ct. 2720, 2743 (1991) 15

Graham v. Wigginton, 818 F.Supp. 336 (M.D. Fla. 1993) 27

Hastings v. Judicial Conference of U.S., 829 F.29 91, 106 (D.C. Cir. 1987) 20

In re Inquiry Concerning a Judge, re: Gary Graham, 620 So.2d 1273 (Fla. 1993) 1

In Re Inquiry Concerning a Judge: Harvey N. Shenberg, et al., 1992 WL 63094 (Fla. Apr. 2, 1992) 27

In re Kelly, 238 So.2d 565 (Fla. 1970) 25

In re Murchison, 349 U.S. 133 (1955) 23

In re Taunton, 357 So.2d 172 (Fla. 1978) 27

Judicial Inquiry and Review v. Snyder, 523 A.2d 294 (Pa. 1987) 18

Maynard v. Cartwright, 486 U.S. 356, 361 (1988) . . . 21

Morial v. Judiciary Commission, 565 F.2d 295, 300 (5th Cir. 1977) 15

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 17

Offutt v. U. S., 348 U.S. 11 (1954) 25

Parker v. Levy, 417 U.S. 733, 756 (1974) 21

Cases ***Page(s)***

Scott v. Flowers, 910 F.2d 201, 209 (5th Cir. 1990) . . 17

United States v. Schneiderman, 968 F.2d 1564, 1567-8 (2d Cir. 1992) 19, 21

United States v. Bassford, 812 F.2d 16, 19 (1st Cir. 1987) 12

United States v. Bustamonte, 805 F.2d 201, 202 (6th Cir. 1986) 12

United States v. McClain, 823 F.2d, 457 (11th Cir. 1987) 23

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982) 21

Wayte v. United States, 470 U.S. 598 . . . . . 12, 13

Widmar v. Vincent, 454 U.S. 263 (1981) 16

Willhauck v. Halpin, 953 F. 2d 689, 712 (1st Cir. 1991) 12

Withrow v. Larkin, 421 U.S. 35 (1975) 23

Other Authorities

Article IV, Section 12, Fla. Const. 22

Article IV, Section 12(d), Fla. Const. 27

Article IV, Section 12(f), Fla. Const. 22

STATEMENT OF THE CASE

Pursuant to the recommendation of the Florida Judicial Qualifications Commission (the "commission"), and upon consideration of its findings of fact, the Florida Supreme Court removed petitioner Gary Graham from the office of county judge of Citrus County, Florida. Graham has filed a petition for certiorari seeking review of the Florida Supreme Court's action. The decision of the Florida Supreme Court is reported *In re Inquiry Concerning a Judge, re: Gary Graham,* 620 So.2d 1273 (Fla. 1993). It is contained in the appendix to the petition at A 3-78.[1]

1. The Decision of the Florida Supreme Court

The Florida Supreme Court's opinion states that the commission made numerous factual findings to support its conclusion that "Graham's cumulative conduct is unbecoming a member of the judiciary and demonstrates a present unfitness to hold office." (A 4) The court did not think it necessary to set forth each particular incident but underscored several that "typified" Graham's judicial behavior. (A 5) In one instance, Graham, as presiding judge, suspended a defendant's driver's license for six months. When the defendant questioned the fairness of the sentence, Graham increased the suspension to nine months and then asked if the defendant wanted the sentence reconsidered. When the defendant answered affirmatively, Graham increased the sentence to one year. (A 5)

In a second instance, following sentencing of a defendant to six months in jail for spray painting vulgar graffiti on public property, the defendant's mother questioned the

---

1 The commission's "Findings of Fact, Conclusions of Law and Recommendation For Removal" are included in the petition appendix at A 20-62.

fairness of the sentence. In a wholly gratuitous response, Graham told the mother she was "the problem" and then engaged the courtroom audience in a discussion of the nature of the offense that the Florida Supreme Court deemed inappropriate, embarrassing, and needlessly vulgar and offensive. (A 5-6)

In a third incident, the defendant was convicted of driving under the influence of alcohol. In open court, Graham stated that a ten-day sentence would have been appropriate but for the defendant's "improper" release on his own recognizance by the sheriff's office. He then sentenced the defendant to ninety days in jail, telling him "That's what you get for trading favors to get out of the Citrus County Jail." The Florida Supreme Court found that the sentence was based on nothing more than Graham's "own allegations of political favoritism in the sheriff's office" and that Graham's "actions constituted an abuse of power and impugned the public's perception of the integrity and impartiality of the judiciary." (A 6-7)

Graham's defense, according to the court, focused on what he believed to be the misconduct of other officials, attorneys and citizens of Citrus County rather than on "the critical issue of his present fitness to serve as a judge." (A 7) Graham failed to recognize that such alleged misconduct did not "justify his repeated departure from the guidelines established in the Code of Judicial Conduct." (A 8) The "direct evidence," according to the court, revealed that "Graham's conduct was, at times, neither professional nor rational, and there was a clear abuse of judicial power to the detriment of individuals." (A 9)

The court did not lightly reach its decision to remove Graham from office. The fact that Graham refused to recognize his own transgressions and showed no remorse clearly weighed against him. (A 11) The court acknowledged that

some of the charges were more severe than others and that standing alone each individual charge might not warrant the extreme step of removal. (A 12) Nevertheless, Graham's cumulative conduct over a period of time and the totality of the circumstances led the court to conclude that Graham demonstrated a serious lack of judicial temperament. (A 12-13) His conduct therefore warranted removal.

Only one justice dissented, but even he stated he would approve the factual findings of the commission "and loudly and severely reprimand Judge Graham." (A 18) That justice also observed that Graham failed to understand that the means employed to accomplish his goals must be within the canons of judicial ethics and he described Graham's conduct in the proceedings before the commission as "deplorable." (A 15)

2. The Findings of the Judicial Qualifications Commission

The commission, by an affirmative vote of at least nine of its thirteen members, found that Graham violated Canons 1, 2, 3A.1 and 3A.3 of the Code of Judicial Conduct "by virtue of his cumulative misconduct." (A 26-27) In summary, the commission found that:

> Respondent [Graham] repeatedly used his position as Citrus County Court Judge to make allegations of official misconduct and improper criticisms against others, exceeded and abused the power of his office by imposing improper sentences and improper use of his contempt power, acted in an undignified and discourteous manner toward those appearing in his court, acted in a manner which impugned the public perception of the integrity and impartiality of the judiciary and closed and attempted to close public proceedings. The Commission further finds that Respondent's

> cumulative conduct is unbecoming a member of the judiciary and demonstrates a present unfitness to hold office.

(A 27)

The commission then set out in detail the factual incidents that supported its finding of cumulative misconduct. These incidents are summarized as follows:

1. Graham's broad and disparaging indictment of the behavior of local attorneys that had no reasonable factual basis. His remarks were made to a news reporter and widely reported in the local media. (A 29)

2. While presiding over a DUI case, *State v. Pfeister,* Graham, in open court, accused the state attorney of "routinely regulating" DUI offenses of lawyers and doctors to reckless driving for "no apparent reason." (A 29)

3. In the same case and during the same hearing, Graham, in open court, accused the State Attorney King of favoritism in the disposition of a DUI case while King was an assistant state attorney.

4. In the same case, Graham, again in open court, repeatedly demanded that the Chief Assistant State Attorney explain the exercise of discretion by the State Attorney's Office in charging the case as a misdemeanor rather than a felony so that Graham could ascertain that the decision was not the result of politics and favoritism. (A 31)

5. On another occasion, in open court, Graham accused the state attorney, and by implication, the chief judge of the circuit, with ex parte communications that Graham claimed resulted in the improper revocation of his appointment as acting circuit judge. He also accused State Attorney King of improperly securing the revocation because of King's displeasure with Graham's decisions in a circuit court case. (A 32)

6. In another DUI case, *State v. Webb,* Graham accused a captain and an investigator in the sheriff's office of "trading official actions for other beneficial acts by the defendant" in releasing the defendant on his own recognizance. (A 33)

7. As presiding judge in the case *State v. Riggs,* a contempt of court proceeding, Graham, in open court, accused the defendant and an assistant public defender of deliberately falsifying a transcript used in the defendant's appeal. (A 34)

In each of the instances described above in 1 through 7, the commission found Graham's remarks were made without a reasonable factual basis, were unnecessary for the proper fulfillment of his judicial duties, were without regard for the professional and personal reputations of those accused, and could reasonably tend to lessen public confidence in the integrity and impartiality of the judiciary. (A 29-34)

8-9. As presiding judge in two separate misdemeanor possession of marijuana cases, *State v. Roose* and *State v. Shirling,* Graham ordered unrepresented defendants to assist authorities in "buys and sells" of drugs as a condition of the sentences imposed. Graham had no information on the suitability or desirability of the defendants' cooperation. (A 35-36)

10. As presiding judge in *State v. Stanage,* Graham suspended a defendant's driver's license for six months. He twice asked the defendant if he wanted the sentence reconsidered and, upon receiving affirmative responses, twice increased the length of time of the suspension. (A 36-37)

11. Graham gave instructions to a sheriff's deputy about courtroom security and threatened to hold the deputy in contempt if the sheriff did not comply with the instructions. (A 38)

12. As presiding judge in *State v. Oldag,* Graham sentenced a defendant to forty hours of community service for the state

attorney's office and advised the defendant he would suspend ten hours of service if defendant washed the state attorney's car with the shirt he was wearing in court. (A 38)

13. As presiding judge in *State v. Barth,* Graham, on learning the defendant was employed as a shrimper, stated that shrimpers were unsavory people who tended to be in trouble. He then placed her on probation with the special condition that she find alternative employment. This order had no relation to the conduct for which defendant was convicted and was not reasonably related to future criminality. (A 39)

14. As presiding judge in *State v. Douglas,* a case involving misdemeanor battery on a spouse, Graham prohibited the defendant from having any contact with his children. (A 40)

With respect to each of the sentencing incidents described above, the commission found that the conditions or sentences imposed were beyond the scope of Graham's judicial authority and that he abused or grossly abused his judicial power. (A 35-40)

15. In another incident occurring in chambers, Graham berated an attorney for wearing a leather sports coat to court and offensively "poked" him in the chest. Although the attorney apologized and stated he would not wear the court again, Graham compelled the attorney to go back into the courtroom wearing another coat belonging to Graham that was several sizes too small. The attorney was greeted with laughter when he returned to the courtroom wearing Graham's coat. (A 41)

16. As presiding judge in *State v. Dobbs,* a misdemeanor case involving spray painting of vulgar graffiti, Graham imposed a sentence of six months imprisonment. When the defendant's mother questioned the fairness of the sentence, Graham accused the mother of being the problem

and then engaged the audience in a vulgar and inappropriate colloquy. (A 42)

The commission found that both incidents evidenced a lack of judicial temperament and his treatment of the attorney was a "gross abuse of his power of office." (A 42-43)

17. In *State v. Webb,* a DUI case, Graham sentenced the defendant to ninety days in jail rather than the ten days he said would otherwise be appropriate because the sheriff's office had released the defendant on his own recognizance. He directed the defendant to "tell your friends that's what you got for trading favors to get out of the Citrus County jail." (A 43-44). The Commission found this act to be vindictive and a gross abuse of power.

18. As part of his defense to the proceedings before the Commission, Graham used the prestige of his judicial office and the resources of the State to conduct a private, unofficial investigation into alleged favoritism and corruption in Citrus County. On local television, he criticized and insulted various public officials and said the Commission's investigation resulted solely from pressure exerted by his political enemies. As part of his personal investigation, Graham obtained copies of public records without paying for them. The commission stated Graham's public attacks were unfounded and impugned the impartiality of the judiciary. (A 45-46)

19. On another occasion, Graham summoned attorneys to his office in a high profile murder case saying he intended to schedule a status conference in the near future. He made it clear he wanted no news reporters present and if necessary he would force them to leave. The status conference did not occur because Graham's appointment as acting circuit judge was revoked. The commission found Graham's conduct clearly improper and contrary to Florida law relating to closure of judicial proceedings. (A 48)

The commission further found that the nineteen incidents described above were "not isolated events, but...part of a pattern of similar misconduct, characterized by [Graham's] arrogant, arbitrary and capricious abuse of the powers of his office." (A 49) The commission observed that Graham refused to testify in his own case and was evasive when called as an adverse witness. (A 50) Graham required his judicial assistant to assist him in preparation of his defense for period of ten months. (A 50) He also utilized other resources of the state in his defense. (A 51)

At least nine of the thirteen commission members agreed that Graham's "cumulative conduct in violation of Canons 1,2,3A.1 and 3A.3 of the Code of Judicial Conduct is unbecoming a member of the judiciary and demonstrates a present unfitness to hold office." (A 52) Under the Florida Constitution, Article V, Section 12(f), malafides, scienter or moral tupitude is not required for removal from office of judge whose conduct demonstrates a present unfitness to hold office. (A. 52)[2]

SUMMARY OF ARGUMENT

Graham's removal from the office of county judge was justified by his own conduct, the facts of which are not disputed. His arguments do not show conflict with another appellate decision, do not raise an important question of federal law, and do not demonstrate any other ground for certiorari review.

The proceeding against Graham was instigated based on his conduct as a judge, not on any impermissible basis such as freedom of speech. Although one of many instances of misconduct involved Graham's comments during a newspaper

---

2 Article V, Section 12(f), Florida Constitution, may be found at A 872.

interview, those comments were not the sole basis for his removal. Further, the impetuousness—not the content—of those comments was critical; Graham was found to have made numerous reckless and unsubstantiated remarks impugning the judiciary and public officials.

Florida's Code of Judicial Conduct can be understood by judges of reasonable intelligence. Any reasonable judge would know that closing public proceedings and abusing contempt or sentencing powers were violations of that code. Since the code *clearly* applied to almost all of Graham's misconduct, the code cannot be held to facially vague.

The Florida Constitution separates investigation and fact-finding by the commission from imposition of a disciplinary measure by the Florida Supreme Court. This arrangement does not violate due process.

Graham's hearing was fundamentally fair. He had several months to prepare. Most important, Graham never disputed the facts of his misconduct, most of which were documented by official court files. Any infrequent lapse in attentiveness by individual commission members did not rise to constitutional significance. Absolutely nothing indicates the commissioners prejudged Graham or considered anything other than the evidence.

Graham's arguments are meritless. His petition should be denied.

ARGUMENT

I.

A GRANT OF CERTIORARI IS NOT WARRANTED IN THIS CASE BECAUSE THE DECISION OF THE FLORIDA SUPREME COURT ADOPTING THE FINDINGS OF THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION CLEARLY JUSTIFIES PETITIONER'S REMOVAL FROM OFFICE; PETITIONER'S ARGUMENT DOES NOT DEMONSTRATE CONFLICT WITH ANY OTHER APPELLATE DECISION NOR DOES IT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND SO FAILS TO ESTABLISH ANY BASIS FOR CERTIORARI REVIEW UNDER RULE 10.1(b) OR (c), RULES OF THE SUPREME COURT.

The decision of the Florida Supreme Court approved the findings and recommendation of the Judicial Qualifications Committee and removed petitioner Graham from office. (A 13) The findings, as approved by the court, state *nineteen* different incidents in which Graham abused the authority of his judicial office. Seven of these incidents involved the abuse or gross abuse of his sentencing powers. Two others concerned what can only be termed wholly unwarranted harassment—in one case of a sheriff's deputy and in the other of an attorney whose attire did not meet the petitioner's sartorial standards. Several others, according to the findings, concerned the petitioner's repeated efforts to impugn the integrity of the state attorney's office and fellow judges without a reasonable factual basis.

The petition completely ignores most of these findings, particularly Graham's abuse of his sentencing authority

and the harassment of the deputy and the attorney. The arguments made mischaracterize the findings in contending that the petitioner was "selectively prosecuted" and removed for exercising his First Amendment rights, those supposedly being the right to criticize in his judicial capacity other public officials and local attorneys and to engage a courtroom audience in a crude and unjustified attack on a mother who dared question her son's treatment. Consistent with what the commission and the court found, Graham still does not comprehend that the office he held carried with it certain restraints on his behavior.

In view of the fact that most of the findings have gone unchallenged and plainly warrant his removal, and also in view of the fact that the arguments made present no important question of federal law much less a conflict with another appellate decision, this Court should deny the petition forthwith.

The argument that follows demonstrates the lack of merit in each of petitioner's stated issues.

A. The Petition Fails To Establish That The Proceeding Below Was A Constitutionally Impermissible Instance Of Selective Enforcement Of The Judicial Code. (Petitioner's Issue I)

In this argument, petitioner mainly voices his personal disagreement with the decision to proceed against him. He complains that other judges were not disciplined for allegedly improper, similar conduct. (Pet. pp. 6-8). He further complains that he was "obstructed from discovery and proving the impermissible motive of silencing his criticism." (Pet. p. 8). Finally, Graham offers the conclusory assertion that "[d]espite the discovery obstructions, the record compels a strong inference of selective enforcement." (Pet. p. 8)

The record is replete with facts establishing the grounds for petitioner's removal. None are factually contradicted in petitioner's argument. All relate to petitioner's repeated misuse and abuse of his position as a county judge and to his improper conduct while presiding over judicial proceedings. (A27) At no point do the commission's findings address Graham's conduct as a private individual.

Petitioner essentially claims that the commission "selectively" proceeded against him.[3] Consequently, decisions addressing selective prosecution are highly analogous. One claiming selective prosecution bears a heavy burden and must make a prima facie showing that he has been singled out for selective treatment based on an impermissible purpose. *United States v. Bustamonte,* 805 F.2d 201, 202 (6th Cir. 1986) (noting that a majority of the federal circuits have adopted the same test). Moreover, a prosecutor's discretion in deciding whom to prosecute is presumably exercised in good faith. *United States v. Bassford,* 812 F.2d 16, 19 (1st Cir. 1987), *cert. denied,* 481 U.S. 1022 (1987). The record submitted here, largely ignored in the petition, shows no impermissible purpose.

This Court's decision in *Wayte v. United States,* 470 U.S. 598, underscores the lack of merit in petitioner's argument. In *Wayte,* the Court addressed the selective prosecution claim raised by a man who refused to register for the draft and stated that the test for showing selective prosecution is "ordinary equal protection standards." 470 U.S. at 608. Those standards are "discriminatory effect and [motivation]...by a discriminatory purpose." *Id. See also Willhauck v. Halpin,* 953 F. 2d 689, 712 (1st Cir. 1991) (selective prosecution claimant must show that others

---

3 Petitioner's Issue I does not cite a single case on selective enforcement of the law. Moreover, of the three cases cited under that issue, not one involves the removal of a judge from office for abuse of his authority.

similarly situated were not prosecuted and the decision to prosecute claimant was motivated by an impermissible reason).

Graham does not meet either prong of the *Wayte* test. The record shows that only his judicial conduct was considered when declaring him to be unfit to hold office. Graham does not attempt to argue that the commission or the court considered anything other than his judicial conduct. He does not even suggest what the impermissible purpose might be.

Similarly, Graham fails to show discriminatory effect. All that he has shown is that other judges—whose alleged improper conduct was not so egregious or frequent—were not disciplined; and that he was removed for improper judicial conduct. As said in *Wayte:*

> All petitioner has shown here is that those eventually prosecuted...violated the law. He has not shown...prosecution on the basis of their speech.

470 U.S. at 609.

Graham's misconduct, as set forth above, established ample grounds for his removal.

B. Petitioner Was Not Removed From The Bench For Exercising His First Amendment Right to Criticize Attorneys. (Petitioner's Issue II)

Graham's argument on the second issue variously asserts that his right to free speech has been abridged and that the standards for judicial discipline are vague. (Pet. p. 12-13). If either argument was made with specificity below, the record petitioner has chosen to present to this Court does

not demonstrate such.[4] Moreover, the record conclusively refutes Graham's claim that he was removed for publicly criticizing attorneys in a newspaper interview. Remarks made during this interview became only a small part of the basis for the commission's first factual finding, that Graham "repeatedly used his position...to make allegations of official misconduct and improper criticisms...without reasonable basis." (A 27-8)

Thus, the main flaw in Graham's argument is his narrow reading of the record, particularly the reasons for his removal. In its opinion removing him from office, the Florida Supreme Court said:

> The JQC made numerous factual findings to support its conclusion that Graham's *cumulative* conduct is unbecoming...and demonstrates a present unfitness to hold office....[W]e mention only a few of the factual findings that typify his behavior and tend to erode the public's confidence in the judiciary. [e.s.]
>
> * * * *
>
> Standing alone, each individual charge might not warrant the extreme disciplinary measure of removal....Graham's *cumulative conduct over a period of time and the totality of the circumstances compel us to consider extreme remedial action.* [e.s]
>
> * * * *

(A 4-13).

---

4 Graham repeatedly objected on due process and "constitutional" grounds (A 214-308), but did not mention the First Amendment. His affirmative defenses (A 309-26) did not broach freedom of speech. Only ground five of Graham's second and fourth amended motion[s] to dismiss nominally invokes the First Amendment. (A 333, 337, 342). In closing argument, petitioner maintained that his appearance on *television* was an exercise of First Amendment rights. (A 457).

Several observations are in order. First, Graham was not removed solely for having participated in the interview. It was but one of many instances illustrating his unfitness. Moreover, the content of his remarks was not at issue. Rather, it was his willingness to make unfounded allegations, in a very public forum, that were calculated to erode public confidence in the judicial system.

Graham refuses to understand that, as a judge, his right to free speech—even outside the courtroom—is more circumscribed that the right enjoyed by an ordinary citizen. *See Gentile v. State Bar of Nevada,* 111 S.Ct. 2720, 2743 (1991) (Rehnquist, C.J., delivering the opinion of the court in parts I and II) (even outside the courtroom, lawyers in pending cases were subject to ethical restrictions on speech not applicable to ordinary citizens). If lawyers—not required to be impartial—can be restricted as to their comments on pending cases, then judges may certainly be restrained from conduct calculated to bring the judicial system into disrepute.

The cases cited by Graham lend no weight to his argument and reflect no conflict with the decision of the Florida Supreme Court. Urging that respondents fail to show a compelling state interest for the "regulation" (apparently, the code of judicial conduct), Graham first relies on *Morial v. Judiciary Commission,* 565 F.2d 295, 300 (5th Cir. 1977) (en banc), *cert. den.,* 436 U.S. 944 (1977). At issue there were Louisiana's statute and canon of judicial conduct requiring judges to resign before announcing their candidacy for nonjudicial, elective offices. Applying a "reasonable necessity standard," *id.* at 301-2, the court ultimately upheld the statute and canon, *id.* at 307, emphasizing the state's interest in ensuring that a judge would not abuse or appear to abuse the office. "Abuse of power" was an expressly cited reason (A 7) for petitioner's removal. *Morial* plainly supports respondents' decision to remove Graham.

Widmar v. Vincent, 454 U.S. 263 (1981), involved a First Amendment challenge to a state university's policy that its buildings or grounds could not be used for religious worship or teaching. The decision concluded that the state's interest in separating church and state was not sufficiently compelling to justify content based discrimination against religious speech of a student group. *Id.* at 277-8. Here, the state's interest in maintaining an impartial, and impartial-appearing, judiciary is far more compelling. Moreover, Florida's canons of judicial conduct are not content-based.

Connick v. Myers, 461 U.S. 138 (1983), does stand for the unquestioned proposition that speech on public issues is entitled to "special protection." *Id.* at 145. Even in that case, the firing of an assistant state attorney—who circulated a questionnaire concerning internal office affairs—was upheld. The one matter of public interest—pressure on employees to work in political campaigns—was analyzed from a First Amendment perspective. This Court struck a balance between the state's interest in maintaining close working relationships and the questionnaire's minimal First Amendment implications, concluding that:

> The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.

Id. at 154.

Here, Graham's responses to questions were a broad and ill-founded attack on the local bar.[5] They were but one of

---

5 For purposes of this response, it will be assumed that Graham's remarks addressed a matter of public concern.

numerous actions that the Florida Supreme Court held indicative of Graham's unfitness to hold office. Notably, the Florida Supreme Court did not rely on the content of Graham's speech, and Graham does not dispute the fact that he made the comments. Graham fails to grasp that his extreme impetuousness—not the content of his speech—was the real ground for his removal. Given the numerous findings—most of which are not challenged—Graham would have been removed absent the interview. *See Scott v. Flowers,* 910 F.2d 201, 209 (5th Cir. 1990) ("[A] public employee who is discharged...for engaging in constitutionally protected conduct is not entitled to any relief if the employer can prove it would have taken the same action absent that conduct.") (*citing Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 [1977]).

Scott provides useful guidance. There, a Texas justice of the peace—a low level judicial office—wrote an open letter which attacked the local "district attorney's office and the county court-at-law for dismissing so many traffic appeals and called upon the county officials to offer suggestions to remedy the problem." *Id.* at 204. The letter was publicly circulated. The Texas Commission on Judicial Conduct then took action and reprimanded Scott for casting public discredit on the judiciary and for being insensitive to litigants. *Id.* Ultimately, the Fifth Circuit reversed. *Id.* at 213.

The critical difference between *Scott* and this case is obvious: the number and type of Graham's actions leading to his removal. The only specific reason for Scott's reprimand was his open letter—the reprimand itself only generally described his insensitivity. *Id.* at 205., n. 6. In contrast, Graham was removed for numerous incidents of abuse of office, misuse of contempt powers, closing public proceedings, etc.

Graham's last case is *Judicial Inquiry and Review v. Snyder,* 523 A.2d 294 (Pa. 1987). He relies on a concurring

and dissenting opinion in that case for the undisputed proposition that removal of a judge is a "matter of gravest possible concern." *Id.* at 300 (McDermott, J., concurring and dissenting).

However, the majority opinion in *Snyder* supports respondents. There, the Pennsylvania Judicial Inquiry and Review Board recommended Judge Snyder be removed. The Board found Snyder held improper ex parte conferences in a case; and, in that case, committed numerous improprieties. *Id.* at 295. The specific improper acts (*id.* at 296-7) led to the conclusion that Snyder violated several judicial canons. The Pennsylvania Supreme Court ordered removal based on the "cumulative effect" of Snyder's actions. *Id.* at 299. Similarly, the Florida Supreme Court expressly based its decision to remove on Graham's "cumulative conduct." (A 4, 12) Even if the newspaper interview were not considered, the Florida Supreme Court would still have found eighteen incidents of improper conduct. The cumulative effect of these incidents plainly warranted Graham's removal.

C. Petitioner Fails to Demonstrate That The Florida Code of Judicial Conduct Is Unconstitutionally Vague Or That The Point was Properly Preserved for Review (Petitioner's Issue III)

Before this Court, Graham's issue statement proclaims the Florida Code of Judicial Conduct is "vague." He does not specify which provisions of that code are vague. Graham's vagueness claim before the Commission was equally ambiguous. There, he broadly declared that the code was "so vague that a reasonable person would not be put on notice of what conduct is prescribed." (A 1055)

Preliminarily, respondents note that Graham's issue statement challenges the judicial code "as applied." At no time

below did Graham make this challenge. He simply and broadly claimed the entire code was vague. Even before this Court, he does not focus on any particular provision of the code and that provision's application under the facts. To the contrary, he always refers to the code generally. He then mounts a defense based in part on "hypothetical circumstances" (Pet. p. 18) that do not correspond to the facts of his case.

Two observations are in order. First, Graham's vagueness claim before the Commission was not made with any specificity. At most, it preserved only a claim of facial vagueness of the code.[6] Second, if Graham preserved a vagueness-as-applied argument[7] he has abandoned that argument by not raising it before this Court. Respondents cannot fairly be expected to answer precisely what are at best amorphous allegations.[8] Therefore, respondents will treat Graham's claim as one challenging the facial vagueness of the judicial code.

On its face, the Code of Judicial Conduct does not purport to restrain constitutionally protected conduct. The canons—1, 2, and 3(A)(1) and (3)—under which Graham was charged declare:

---

6 Respondents assume Graham challenges only that part of the code he was charged with violating. He is obviously unaffected by the remainder.

7 Graham certainly is capable of making this distinction. In Issue II, he focuses on one ground for removal as the basis for his First Amendment claim.

8 The test for vagueness as applied has two parts: (1) whether a statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) whether the law provdes explicit standards for those who apply it. *U.S. v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir. 1992), *cert. den.*, 113 S.Ct. 1283 (1993) [citations omitted]. Since Graham has never stated specific vagueness claims against any particular provision of the code, respondents cannot be expected to speculate the nature of his vagueness-as-applied argument and apply the exacting two-part test discussed in *Schneiderman*.

> Canon 1: A judge should uphold the integrity and independence of the judiciary.
>
> Canon 2: A judge should avoid impropriety and the appearance of impropriety in all his activities.
>
> Canon 3(A)(1): A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.
>
> Canon 3(A)(3): A judge should be patient, dignified, and courteous to litigants [etc.]...with whom he deals in his official capacity, and should require similar conduct of lawyers, and...others subject to his direction and control.

None of the above canons facially attempts to regulate the content of a judge's speech. To the contrary, the code is primarily directed toward judicial misconduct. *See, Hastings v. Judicial Conference of U.S.,* 829 F.29 91, 106 (D.C. Cir. 1987), *cert. den.,* 485 U.S. 1014 (1988) (legislative history of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 revealed that the Act was "directed toward serious judicial transgressions, not against protected speech").

This Court has upheld employee codes, provisions of which are at least as general as the judicial code, against claims of vagueness and overbreadth, ruling that such claims are best addressed through case-by-case analysis of specific fact situations. *Broaderick v. Oklahoma,* 413 U.S. 601, 615-616 (1973). If anything, Graham's petition assiduously avoids analyzing the specific reasons for his removal.

Graham must show, therefore, that the code is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 (1982) (construing a statute); *U.S. v. Schneiderman,* 968

F.2d 1564, 1567-8 (2d Cir. 1992), *cert. den.*, 113 S.Ct. 1283 (1993) (to be facially vague, a statute must be impermissibly vague in all of its applications). Conversely, if Graham's conduct clearly fell within the code's prohibitions, then he cannot challenge it for vagueness. *See Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not challenge it for vagueness").

Graham's argument is expressly based, in part, on hypothetical application of the code to others. As Graham states: "The deponents were tested to determine whether hypothetical circumstances were prescribed by the Code." (Pet. p. 18) Graham's hypotheticals are irrelevant, however, because this Court must examine Graham's own conduct "before analyzing other hypothetical applications of law." *Hoffman Estates*, 455 U.S. at 495. Any fair reading of Graham's conduct reveals that the code very clearly applied to him. Notably, Graham does not dispute the factual basis of any of the commission's findings. As the commission stated, the "vast majority of the allegations were proven by official court records." (A 48)

"Objections to vagueness under the Due Process Clause rest on lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). Graham cannot be heard to say he did not know the vast majority of his actions were "at risk."

In sum, Graham's ambiguous vagueness claim, nominally a challenge as applied, is actually a facial attack on the code. It must fail, first, because the code is not shown to be impermissibly vague; and, second, because any reasonable judge would know that Graham's many acts (as found by the commission) were proscribed.

D. The Structure of Florida's Judicial Disciplinary Mechanism Does Not Violate Due Process (Petitioner's Issue IV)

Graham complains that Florida's mechanism for disciplining of judges violates due process. That mechanism, established by Art. IV, § 12 Florida Constitution, provides that the commission investigate complaints against judges, and recommend removal or lesser disciplinary measures to the Florida Supreme Court. At least nine of the thirteen commission members must vote in favor of recommending a specific sanction. Art. IV, § 12(f). The Florida Supreme Court, by majority vote, acts upon the commission's recommendations.

Graham's argument has an obvious and basic flaw. While the commission performs an investigative and fact-finding role, it is the Florida Supreme Court (as "judge") that decides the appropriate penalty. That court is not bound by the commission's recommendation.

Graham's "Fourth Amended Motion to Dismiss" (A 801-67) did not raise the issue raised here. At most it made the conclusory allegation that the commission was an "unconstitutional institution" (A 802, 829-30) which lacked jurisdiction. (A 830) Otherwise, Graham's fourth motion to dismiss indulged in a lengthy diatribe against every procedural aspect of his hearing. (A 805-29) Overall, the motion attributes the proceeding to a conspiracy by "the local Bar, the local press, the local politicians, and the sheriff [who] do not like him and want his removal." (A 805). Only in his "Third Memorandum of Law in Support of Second Motion to Dismiss" does Graham tersely complain about the commission's combined investigative and fact finding roles. (A 997-8).

Graham's argument on this issue does not address the structure and role of the commission but, instead, objects to

the procedural and evidentiary rulings made at his hearing. His reliance on *Withrow v. Larkin,* 421 U.S. 35 (1975), further illustrates the weakness of his argument. In *Withrow,* this Court discussed several precedents rejecting due process claims based on the combination of investigative and investigatory functions. *Id.* at 1465-7. The only exception was the decision of *In re Murchison,* 349 U.S. 133 (1955). There, a state law authorized a judge to sit as a one person grand jury, compel testimony in secret, charge witnesses with contempt, and then try and convict those witnesses. 349 U.S. at 53. This court declared there was nothing in *Withrow* that fell within the strictures of *Murchison.*

As was found determinative in *Withrow,* 349 U.S. at 54, there is nothing in the record indicating the commission or Florida Supreme Court had prejudged Graham. While the *Withrow* court recognized the need to be alert to possible bias from how "particular procedures actually work in practice," it also said the "processes used by the Board, however, do not in themselves contain an unacceptable risk of bias." *Id.* Nothing in the Florida Constitution or in the commission's rules, however, contains an unacceptable risk of bias, and Graham does not so argue. The Florida Constitution separates investigation and fact-finding from adjudication.

Graham also contends that "[l]ess egregious conduct" (Pet. p. 24) warranted reversal in *U.S. v. McClain,* 823 F.2d, 457 (11th Cir. 1987). The most cursory examination of *McClain* reveals its total inapplicability. That case involved a federal RICO and drug dealing trial. The defendant faced severe criminal penalties. Defense counsel had a conflict of interest. *Id.* at 1463-4. One co-defendant's guilty plea was admitted into evidence without an instruction properly limiting its use. *Id.* at 1466. The trial court erred by failing to sever unrelated criminal charges. *Id.* at 1467. All of this was in addition to conduct-of-trial errors by the judge and prosecu-

tor, the cumulative effect of which also denied the defendants a fair trial. *Id.* at 1462.

Nothing of the sort occurred here. Initially, this was a judicial disciplinary proceeding that could impose no criminal sanctions or fines. There was no defense counsel as Graham chose to represent himself. Admissibility of evidence was not at issue.

Whatever the merit of Graham's argument, it goes only to the propriety of his hearing. It has no bearing on the facial validity of Florida's constitutional provisions for discipline of judges. On *this* issue, Graham has failed to adduce any authority supporting the argument that the combined investigative and fact-finding roles of the commission facially violate due process.

E. The Proceeding Against Graham Was Not Fundamentally Unfair. (Petitioner's Issue V)

As a Parthian shot, Graham broadly takes issue with nearly all rulings, evidentiary and procedural, made during his hearing. His conduct at the hearing—characterized as "deplorable" by the dissenting member of the Florida Supreme Court—demonstrated what Graham's argument to this Court implies. Graham wanted not a fair hearing, but the most protacted proceeding imaginable.

Even Graham's argument before this court belies his position. In Issue IV, he claims that "[n]o less than 65 times Petitioner was not allowed to proffer legal objections or argument." (Pet. p. 24). To believe that any presiding officer would capriciously refuse so many proffers or arguments, if they were plausible, strains common sense. Rather, it is much more reasonable to conclude that Graham—as noted by Justice McDonald—"presented large amounts of irrelevant evidence,

constantly challenged the chairman of the commission, and made numerous unnecessary objections." (A 15-16).

While Graham's conduct, however bad, could not justify a hearing that was inherently unfair, that conduct certainly explains the terseness of some of the presiding officer's responses. Moreover, it must be noted that Graham has very selectively culled a small number of favorable-sounding fragments from a hearing transcript comprised of close to 3,000 pages.[9]

It is telling that, once again, Graham fails to adduce authority supporting his position. Instead, he cites to *Offutt v. U. S.*, 348 U.S. 11 (1954), which reversed a contempt conviction imposed by a judge who became personally embroiled with counsel. The factual and legal irrelevance of *Offutt* is obvious. Graham's only other authority is *In re Kelly*, 238 So.2d 565 (Fla. 1970). There, a Florida judge was found by the Judicial Qualifications Commission to be guilty of conduct "unbecoming a member of the judiciary." *Id.* at 566. Strikingly similar to this case, Kelly's guilt was predicated on a "pattern" of hostility toward:

> many attorneys, court officials, and fellow judges, as well as a concerted effort to pamper the public and news media by press releases designed to bolster his personal image at the expense of the judiciary.

Id.

Rejecting Kelly's First and Fourteenth Amendment challenges to the proceedings against him, the Florida Supreme Court contrasted the JQC's action with a criminal prosecution. It noted that the commission, and the effects of its action, had no attributes of a criminal proceeding. *Id.* at 569-70.

---

9 At page 306 of the appendices to Graham's petition for certiorari, there is a cite to page 2721 of the hearing transcript.

Kelly also challenged his proceedings on due process grounds. The court noted he had counsel, and that:

> the hearing afforded petitioner met all the standards of judicial procedure. The findings of the Commission were not made until after a fair investigation and with such notice, hearing and opportunity to answer for the petitioner as would constitute due process.

Id. at 571. Here, Graham brings no challenge to the investigatory part of the commission's actions. As noted by the Florida Supreme Court, he had five and one-half months to prepare for his hearing. (A 10). Graham filed and voiced numerous objections, motions to dismiss, and affirmative defenses. Even his fragmented rendering of the record shows only that his oft-repeated objections were tersely overruled.

Otherwise, Graham complains about alleged conduct of individual commissioners, such as reading the newspaper or falling asleep during the "proceedings." Assuming that all of the acts occurred during the presentation of evidence—as opposed to during a recess or proffer—does not help him. Nothing indicates the individual members were biased or otherwise not performing their duties. Taken in isolation, these brief lapses in, at most, the appearance of attentiveness do not rise to fundamental unfairness, and Graham cites no authority for such a conclusion.

Procedural due process requires that a "judge be given notice of proceedings against him or her, that a judge be given an opportunity to be heard, and that the proceedings against a judge be essentially fair." *In Re Inquiry Concerning a Judge: Harvey N. Shenberg, et al.*, 1992 WL 63094 (Fla. Apr. 2, 1992). Additionally, Art. 4 § 12(d), *Fla. Const.*, provides that the commission shall adopt rules regulating its proceedings. The commission has adopted, and the Florida Supreme Court has

approved, such rules. 485 So.2d 1116 (Fla. 1984). Rule 16 provides a judge with various procedural rights in order to insure a fair hearing. In this case, Graham was given notice of the proceedings and an opportunity to be heard. The rules were followed. The proceedings were fair.

Graham received notice of the investigation and a reasonable opportunity to be heard. That he chose to use his time unwisely and inappropriately by attempting to *voir dire* the commission and challenge its authority is not a basis for a claim of violation of his due process rights. If Graham was indeed unprepared for his hearing, it was not because the commission failed to afford him adequate time to prepare; it was because of the decisions he made and actions he undertook as his own counsel, such as filing a meritless complaint in federal court on the eve of the hearing. The complaint was dismissed. *Graham v. Wigginton,* 818 F.Supp. 336 (M.D.Fla. 1993). *See In re Taunton,* 357 So.2d 172 (Fla. 1978) (three and one-half months between commencement of formal proceedings and the hearing provided ample time for a non-lawyer county judge to obtain counsel and prepare a defense to charges.)

The members of the commission sat through eight days of hearing in this case. The record of the hearing is replete with Graham's constant efforts to delay and impede the hearing. The fact that some of the commissioners may have talked among themselves or glanced at a newspaper during these periods of intentional delay is not a violation of Graham's right to due process. It is not a reason for this Court to reject the commission's thoughtful findings, conclusions and recommendation.

Finally, respondents emphasize that Graham has never disputed the factual basis for his removal. He could hardly do so with credibility, as many of his actions were reflected

in official court records; or in audio and video tapes of court proceedings. (A 30-48).[10]

CONCLUSION

Petitioner has failed to demonstrate any basis for this Court to grant a writ of certiorari, and, accordingly, the Court should deny the petition.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Counsel of Record
Florida Bar No. 014008

CHARLIE MCCOY
Assistant Attorney General
Florida Bar No. 0333646

DEPARTMENT OF LEGAL AFFAIRS
The Capitol – PL-01
Tallahassee, FL 32399-1050
(904) 488-9935

---

10 The Commission concluded that the "vast majority of the allegations were proven by official court records" (A 48), and that other allegations were proven by stipulated evidence. (A 49).